

STATE OF MICHIGAN
IN THE SUPREME COURT

DEBORAH SUE NICKE,

Plaintiff/Appellee,

Michigan Supreme Court No.130666
Court of Appeals Docket No:263929
Wayne County Circuit Court Case
No. 03-335375-NI
Hon. Gershwin A. Drain

vs.

KENNETH M. MILLER, AUTOMOTIVE RENTALS, INC.,
HIGH VOLTAGE MAINTENANCE CORPORATION,
EMERSON ELECTRIC CO.,

Defendants/Appellants,

vs.

JUAN HERNANDEZ-MORENO

Defendant.

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Suppl

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**SUPPLEMENTAL BRIEF OF DEFENDANTS/APPELLANTS KENNETH MILLER,
AUTOMOTIVE RENTALS, INC., HIGH VOLTAGE MAINTENANCE CORPORATION
AND EMERSON ELECTRIC CO.'S IN SUPPORT OF THEIR APPLICATION FOR
LEAVE TO APPEAL**

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SUPPLEMENTAL ARGUMENT

I. THE COURT OF APPEALS ACTUALLY DETERMINED THAT APPELLEE DID NOT SUSTAIN A SERIOUS IMPAIRMENT OF A BODY FUNCTION AND COMMITTED REVERSIBLE ERROR BY REVERSING THE TRIAL COURT WHICH MADE THE SAME DECISION.

The Court of Appeals' reversal and remand of this case to the trial court for a determination of whether Appellee sustained a "temporary" serious impairment of body function, "given the significant nature of the surgeries involved in treating plaintiff's injury," turns the *Kreiner v Fischer*, 471 Mich 109 (2004) decision on its head. In *Kreiner*, this Court instructed trial courts to "engage in a multifaceted inquiry, comparing the plaintiff's life before and after the accident as well as the significance of any affected aspects on the *course* of the plaintiff's overall life." *Id* at 132-133 (emphasis added). Indeed, the trial court understood this directive and completed this analysis as evidenced by its opinion memorialized in the transcript.

In its opinion, the Court of Appeals agreed with the trial court when it found that:

"[P]laintiff failed to present evidence to establish that her general ability to lead her normal life has been affected, so the trial court correctly found that plaintiff is not presently suffering a serious impairment of an important bodily function." (See **Exhibit 3** to Defendants/Appellants' Application for Leave to Appeal, Court of Appeals Opinion at p. 2.)

This determination by the Court of Appeals actually resolved the threshold issue in favor of the Appellants and summary disposition should have been affirmed. However, the Court of Appeals proceeded to discuss the nature of the Plaintiff's surgeries involved in treating her injury and concluded that although Appellee's serious impairment, if any, was not *permanent*, there remains a possibility that the serious impairment was "temporary."

When the Court of Appeals distinguished a "serious impairment" as either *permanent* or *temporary*, it ignored the analysis this court set forth in *Kreiner* and erroneously reversed the trial court.

It appears the Court of Appeals focused its attention on the nature of the surgeries involved in treating Plaintiff's injury and whether they were sufficient to constitute a "temporary" serious impairment of an important body function. The Court of Appeals required the trial court to revisit a limited period of time in Appellee's life despite the fact that the trial court had already considered these injuries in comparison to her entire life before and after the accident.

The exact language contained in MCL 500.3135(1) indicates that the threshold has been satisfied if the injured person has suffered a "serious impairment of body function." There is no language in the statute indicating that the impairment must either be "temporary" or "permanent." The only requirement is that the impairment be "serious" which is further defined in MCL 500.3135(7) as:

An objectively manifested impairment of an important body function that affects the person's general ability to lead his or her normal life.

When the Court of Appeals found that "plaintiff failed to present evidence to establish that her general ability to lead her normal life has been affected," it actually determined that Plaintiff had not met the threshold and, therefore, committed reversible error by reversing the trial court. Although the Court of Appeals was mindful of Appellee's surgeries in connection with language in *Kreiner* suggesting that impairments of short duration do not necessarily preclude a finding of a serious impairment of body function, it still determined that when Appellee's life was examined with respect to its entirety, her general ability to lead her normal life had not been affected. Any further examination of whether the serious impairment was

"temporary" was not warranted or necessary under the *Kreiner* analysis. When no serious impairment was found, the trial court's decision should have been affirmed.

The Court of Appeals erroneously distinguished a serious impairment as being either "temporary" or "permanent." There is no language in MCL 500.3135 creating such a distinction. Appellants believe the Court of Appeals was attempting to make a distinction between "temporary" and "permanent" impairments. To qualify an impairment as either "temporary" or "permanent" is, in effect, considering the temporal factors cited in *Kreiner* as part of the analysis. Appellants are mindful of the language in *Kreiner* stating that "[W]hile an injury need not be permanent, it must be of sufficient duration to affect the course of a plaintiff's life," *Id.* at 135. Appellants submit that the trial court did not believe that Appellee's injuries were of sufficient duration to constitute a "serious" impairment of body function. The trial court examined the Plaintiff's life with respect to its entirety and found that Appellee was generally able to lead her normal life.

In its opinion, the Court of Appeals unknowingly determined that the time period for Appellee's surgeries and rehabilitation was not of a sufficient duration to affect the course of her life. Had the Court of Appeals concluded that this limited time period was sufficient to affect the course or trajectory of her normal life, it would have held that Appellee sustained a "serious" impairment of body function and reversed the trial court's decision. However, this finding was not made because the Court of Appeals already decided that Appellee was not presently suffering from a serious impairment of body function because "plaintiff's life before the accident is not substantially different from her life after the accident." (See **Exhibit 3**). Thus, it logically stands to reason that the time period the Court of Appeals instructed the trial court to revisit on remand had already been considered by the trial court, and also the Court of Appeals, when both courts

determined that, "plaintiff failed to present evidence to establish that her general ability to lead her normal life has been affected." The Court of Appeals should have affirmed the decision of the trial court and remanded this case for entry of judgment in favor of Appellants.

The "sufficient duration" requirement espoused in *Kreiner* is in harmony with this Court's mandate that "*the whole life be considered in determining what satisfies this threshold*, i.e., whether an impairment 'affects the person's general ability to lead his or her normal life.'" *Id.* at 133, fn. 16 (emphasis added). Contrary to Appellee's argument to this Court, each discretionary objective factor listed in *Kreiner* contains a temporal or time-sensitive element except for factor (a).¹ Despite the fact that the trial court reviewed Appellee's life before and after the accident, the Court of Appeals has unnecessarily required the trial court to engage in another review with narrower time parameters. The Court of Appeals decision is clearly at odds with the axioms established by this Court in *Kreiner* that "the whole life be considered" and the "injury must be of sufficient duration to affect the course of a person's life." *Id.*

The factual basis for the Court of Appeals' decision to remand this case to the trial court for a second look is premised on the "significant nature of the surgeries involved in treating plaintiff's injury" See **Exhibit 3**. Although surgical procedures, such as the surgeries in this case, are invasive, they, by themselves, are not dispositive of the issue of whether a plaintiff sustained a serious impairment of body function. The "type of treatment" is just one of many factors a court considers when determining whether a plaintiff's general ability to lead a normal life has been affected. Here, the trial court was aware of Appellee's surgeries which were

¹ In *Kreiner*, this Court formulated the following list of factors to provide guidance for a trial court when determining whether a plaintiff's general ability to lead a normal life has been affected:

(a) the nature and extent of the impairment, (b) the type and length of treatment required, (c) the duration of the impairment, (d) the extent of any residual impairment, (e) the prognosis for eventual recovery.

Id. at 133.

addressed in the briefs and discussed during oral argument of the motion for summary disposition. Having all this pertinent information before it, the trial court properly determined that Appellee did not sustain a serious impairment of body function when considering the course or trajectory of her life.

Appellee argues that the trial court overemphasized the durational or time sensitive factors under *Kreiner* to the exclusion of the “type of treatment” factor. Even if this was true, *Kreiner* clearly states that the “list of factors is not meant to be exclusive nor are any of the individual factors meant to be dispositive by themselves.” *Id.* at 134-135. The import of this principle is that this Court has delegated to trial courts broad discretion when determining the issue of whether a plaintiff’s general ability to lead a normal life has been affected. Here, the trial court exercised its discretion and reached a decision predicated upon Appellee’s entire life, including her preexisting neck and shoulder conditions.

When deciding a threshold issue, courts must determine whether the injured person has suffered a "serious" impairment of body function. There is no differentiation between a "temporary" or "permanent" serious impairment. Although an impairment may be temporary or permanent, the no-fault statutes require the impairment be serious which necessitates a finding that the injured person has an objectively manifested impairment of an important body function that *affects the person's general ability to lead his or her normal life*. When the Court of Appeals differentiated between a "temporary" serious impairment and a "permanent" serious impairment, it ran afoul of MCL 500.3135 and the analysis set forth by this court in *Kreiner*. Despite this confusion, the Court of Appeals actually, but unknowingly, found in favor of Appellants when it determined that "plaintiff failed to present evidence to establish that her general ability to lead her normal life has been affected." This language comes from MCL

500.3135(7) and presumes that the Court of Appeals, like the trial court, considered Appellee's entire life when deciding this issue. Having found that Appellee did not present evidence to establish a serious impairment of body function, the Court of Appeals should have affirmed the decision of the trial court and remanded this case for entry of judgment in favor of Appellants.

RELIEF REQUESTED

Wherefore, Defendants-Appellants, KENNETH MILLER, AUTOMOTIVE RENTALS, INC., HIGH VOLTAGE MAINTENANCE CORPORATION and EMERSON ELECTRIC CO., respectfully request that this Court grant their Application for Leave to Appeal, or in the alternative, to reverse the decision of the Court of Appeals and reinstate the trial court's opinion and order granting Defendants-Appellants' motion for summary disposition pursuant to MCR 2.116(C)(10).

Respectfully submitted,

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